Onus probandi in the Whaling Case

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Onus probandi in the Whaling Case – a comment

6. Mai 2015 James Harrison burden of proof, ICJ, Law of the Sea, reply

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It is perhaps no surprise that Japan has decided to resume its scientific whaling following the judgment of the International Court of Justice in March 2014. After all, the Court noted that 'Article VIII [of the International Convention for the Regulation of Whaling (ICRW)] expressly contemplates the use of lethal methods' [§83], thereby confirming the right of Japan to conduct scientific whaling, including the killing of whales, provided that the research was for scientific purposes and the design and implementation of the proposed programme was consistent with the research objectives set out therein. Whilst the Court found that JARPA II – the Japanese Whale Research Program under Special Permit in the Antarctic – was lacking in this respect, it is anticipated in the judgment that Japan could revise its scientific whaling programme in light of the failures identified by the Court.

It is also no surprise that the renewed Japanese scientific whaling programme in the Southern Ocean continues to be controversial. An independent expert panel convened by the International Whaling Commission has declared that Japan has failed to justify plans to resume its banned 'scientific' whaling in the Antarctic. However, neither this panel, nor the the International Whaling Commission or its Scientific Committee has the power to invalidate the permits issued by Japan. The only legal recourse that is available is further proceedings against Japan, which would force that country to justify its new scientific research programme.

As the blog post by Nelson Coelho points out, the Court undertook a discrete but very relevant inversion of the onus probandi when saying that 'the Court will look to the authorizing state, which has granted special permits, to explain the objective basis for its determination.' [§69] The Court then applied a reasonableness test in order to determine whether Japan had met its obligations under Article VIII of the ICRW. This inversion of the burden of proof was challenged by Judge Owada in his dissenting opinion, invoking the presumption in international law that states act in good faith. Indeed, the Court could be criticised for not expressly explaining why it carried out this inversion of the burden of proof. However, it is not clear that 'the inversion of the burden of proof by the ICJ in this case does not appear to necessarily lead[s] to a rebutall of the presumption of good faith', as suggested by Coelho. Nor is it necessary to invoke a cosmopolitan-orientated perspective of international law in order to explain these legal acrobatics.

The inversion of the burden of proof may instead follow from a classification of Article VIII of the ICRW as an exception to the substantive rules in that treaty. Indeed, this was the argument that was made by Australia and New Zealand in their pleadings, reflected but not explicitly addressed by the Court in its reasoning. [§52-55] However, the language of Article VIII would expressly support this view. The provision begins by saying: 'Notwithstanding anything contained in this Convention…'. As has been noted by the Appellate Body of the World Trade Organization in a different context (*EC – Tariff Preferences*, Document WT/DS246/AB/R, 2004, §90], the use of the term 'notwithstanding' indicates an exception to a treaty, which leads to the reversal of

the burden of proof in line with the legal principle that the onus of invoking and proving the consistency of a measure with the requirements of an exception is placed on the responding party. [Ibid, § 88]

Even if it is accepted that the burden of proof is on Japan to demonstrate that its new scientific whaling programme is reasonable, it would require Australia or another state to commence a new set of legal proceedings in order for the compatibility of these measures with international law to be decided by the Court. Such litigation would involve significant additional time and costs, with no prospect of a final resolution to the dispute, as Japan could insist on its right to continue adapting its scientific whaling programme until it is judged to be compliant with Article VIII. Indeed, as the Court fell short of saying that the lethal taking of whales was prohibited under Article VIII, anti-whaling campaigners are unlikely to be satisfied with any solution according to the current legal framework. The impasse is likely to continue until a political solution is found to the real dispute: whether the IWC should be working towards a recommencement of commercial whaling, once stocks have reached a level when whaling is sustainable, or whether whaling should be completely prohibited because of the special characteristics of whales as a species. This is a dispute that the Court cannot resolve.

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